

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 28, 2009

JAMES H. SIMONTON, JR., v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Sullivan County
No. C55, 288 Robert H. Montgomery, Jr., Judge**

No. E2008-01999-CCA-R3-PC - Filed December 30, 2009

The pro se petitioner, James H. Simonton, Jr., appeals as of right from the Sullivan County Criminal Court's summary dismissal of his petition for post-conviction relief attacking his twelve-year sentence as a career offender for maintaining a dwelling where controlled substances were used or sold, a Class D felony. The Petitioner argues that the post-conviction court erred in (1) finding that his sentence was not imposed in contravention to State v. Gomez, 239 S.W.3d 733 (Tenn. 2007), (2) summarily dismissing his post-conviction petition without the appointment of counsel or amendment of the petition, and (3) failing to recuse itself from the consideration of the petition. Following our review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

James H. Simonton, Jr., Mountain City, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; and H. Greeley Wells, Jr., District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The record reflects that the Petitioner was convicted of maintaining a dwelling where controlled substances were used or sold and of criminal conspiracy to sell or deliver .5 grams or more of cocaine within one hundred feet of a school arising from activities observed during a Second Judicial District Task Force surveillance of the Petitioner's residence in Kingsport, Tennessee during November and December 2003. State v. James Simonton, No. E2006-01529-CCA-R3-CD, 2007WL3379791, at * 1 (Tenn. Crim. App. Nov. 15, 2007). On direct appeal, this court concluded that the evidence was insufficient to support the conviction for conspiracy to sell or deliver .5 grams or more of cocaine but affirmed the conviction and sentence for maintaining a dwelling where

controlled substances are used or sold. Id. On direct appeal, the Petitioner challenged his classification as a career offender and this court affirmed the trial court's findings and sentence. Id. at *14.

On June 6, 2008, the Petitioner filed a "Motion for Reduction and/or Correction of Sentence and/or Post-Conviction Relief" alleging that his twelve-year sentence for maintaining a dwelling where controlled substances are used or sold was illegally enhanced in contravention of Gomez and Blakely v. Washington, 542 U.S.296, 124 S. Ct. 2531 (2006). Because the pleading was filed well beyond the one hundred and twenty day time limit for a motion for reduction of sentence pursuant to Rule 35 of the Tennessee Rules of Criminal Procedure, the post-conviction court treated the pleading only as a timely-filed petition for post-conviction relief. Based upon its finding that the issue of the propriety of the Petitioner's range classification was previously determined on direct appeal, the post-conviction court summarily dismissed the petition.

ANALYSIS

The Post-Conviction Procedure Act provides relief from a "conviction or sentence [that] is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. The Act further provides that a petition for post-conviction relief must specify grounds for relief and set forth facts to establish a colorable claim. Tenn. Code Ann. § 40-30-106(d). "A colorable claim is a claim, in a petition for post-conviction relief, that, if taken true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28, § 2(H). When the facts of a petition, taken as true, would not entitle a petitioner to relief, then the post-conviction court may dismiss the petition without the appointment of counsel or an evidentiary hearing. Tenn. Code Ann. § 40-30-106(f). Furthermore, a claim for relief will be deemed previously determined "if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-106(h). Any claims found to be previously determined claims shall be summarily dismissed. Tenn. Code Ann. § 40-30-106(f).

The decision of a post-conviction court to summarily dismiss a petition for post-conviction relief for failure to state a colorable claim is reviewed as a matter of law. See Burnett v. State, 92 S.W.3d 403, 406 (Tenn. 2002). Therefore, our review of the post-conviction court's dismissal is de novo. See id.; Fields v. State, 40 S.W.3d 450, 457 (Tenn. 2001).

We agree with the post-conviction court's finding that the Petitioner's allegation regarding his classification as a career offender was previously determined on direct appeal. This court reviewed the propriety of the career offender classification on direct appeal and held it was proper. The Petitioner received a sentence of twelve years for his Class D felony conviction, which was the only sentence available to the Petitioner as a career offender. Tenn. Code Ann. § 40-35-108(c). Thus, there is no merit to claiming improper enhancement to the length of the sentence. Accordingly, we conclude that the post-conviction court correctly dismissed the petition for post-conviction relief.

Concerning the Petitioner's allegation that the post-conviction court should have recused itself from consideration of this case, the record does not reflect any motion ever filed by the Petitioner seeking the post-conviction court's recusal. The only reference to any recusal issue appears in the summary dismissal order and appears to be a generic statement made by the post-conviction judge acknowledging his prior employment in the District Attorney General's Office and asserting that he was not involved in the Petitioner's prosecution. Nothing in the record before this court dispels these assertions. Under these circumstances, we cannot conclude that the post-conviction judge erred by considering the Petitioner's case.

CONCLUSION

In consideration of the foregoing, the judgment of the post-conviction court is affirmed.

D. KELLY THOMAS, JR., JUDGE